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No. 88-712

In the Supreme Court of the United States

OCTOBER TERM, 1988

RALPH B. SHIRLEY, ET AL., PETITIONERS

v.

JOSEPH G. SCHRAER, POSTMASTER, UNITED STATES POSTAL SERVICE, SAN ANTONIO DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' challenge to the Postal Service's issuance in 1987 of special cancellation stamps to commemorate the September 1987 visit of Pope John Paul II to the United States is moot.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 33-35) is reported at 851 F.2d 1419 (Table). The opinion of the district court (Pet. App. 29-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1988. The petition for a writ of certiorari was filed on October 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 29, 1987, the United States Postal Service announced plans to offer pictorial philatelic cancellations in each of the nine United States cities that Pope John Paul II planned to visit from September 10 to September 19,

1987 (Pet. App. 33). On request by a postal customer, designated postal stations in each of the nine cities would hand-cancel the customer's postcards or first-class letters with a special rubber stamp bearing the emblem of the Vatican city state. The Postal Service selected the 1987 visit of Pope John Paul II as the subject of a pictorial philatelic cancellation because the visit was an event of widespread national interest by virtue of the Pope's position as a world leader and head of state. See Declaration of W.L. Davidson ¶¶ 3, 7, 9, 10, 23.[1] One of the nine cities that the Pope planned to visit was San Antonio, Texas (Pet. App. 18).

On August 25, 1987, petitioners filed a complaint against the United States Postmaster General and the Postmaster of San Antonio in the United States District Court for the Western District of Texas. The complaint sought temporary and permanent injunctive relief barring respondents from issuing the pictorial cancellation as described above (Pet. App. 34).

After the district court denied petitioners' motion for a preliminary injunction by order of September 11, 1987 (Pet. App. 25), the Pope completed his visit to the United States, and the Postal Service issued the cancellation stamps in question. The district court later granted the Postal Service's motion to dismiss the case as moot, rejecting petitioners' argument that the case falls within the category of cases that are "capable of repetition, yet evading review" (Pet. App. 29). Citing this Court's decision in *Murphy* v. *Hunt*, 455 U.S. 478 (1982), the district court explained that a case falls within that category only when "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and

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[1] The Davidson declaration is in the record as an attachment to respondents' opposition to petitioners' motion for a preliminary injunction.

(2) there is a reasonable expectation that the same complaining party will be subjected to the same action again" (Pet. App. 29). The court further explained that "[m]ere physical or theoretical possibility is not sufficient. Rather, there must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same party" (Pet. App. 29-30 (citations omitted)).

Applying that standard, the district court found that the cancellation stamp that commemorated the September 1987 visit of John Paul II was developed for that one event and is no longer in use (Pet. App. 30). The district court also found that another visit by John Paul II is "only a possibility," since there are "no plans for another visit here by this Pope" and since "[n]umerous events could transpire hereafter which could affect such a possibility" (*ibid.*). Based on those findings, the district court concluded that a ruling on the constitutionality of the cancellation stamp would be "a mere advisory opinion which may never have legal consequences" (*ibid.*).

The court of appeals affirmed, holding that petitioners "have not established a 'demonstrated probability' or a 'reasonable expectation' that the current pope or his successor will visit the U.S. and that the Postal Service will commemorate the event with special cancellations" (Pet. App. 35). Rather, the court of appeals found, petitioners "have shown no more than a speculative possibility of such occurrences" (*ibid.* (citing *Murphy* v. *Hunt*, *supra*, and *Weinstein* v. *Bradford*, 423 U.S. 147 (1975)). The court of appeals rejected petitioners' contention that the Postal Service's issuance of cancellation stamps in connection with previous papal visits to the United States and "the great pastoral and financial success of the Pope's most recent visit" satisfy the "demonstrated probability" test (Pet. App. 34-35).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners concede that the district court and the court of appeals applied the correct legal standard to the facts of this case. They acknowledge that this case is moot unless there is a "demonstrable probability that the same controversy will recur involving the same complaining party" (Pet. 5-6 (citing *Murphy* v. *Hunt, supra*)). Accord *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108-109 (1983); *Weinstein* v. *Bradford, supra.* Thus, the only issue presented by the petition is whether that standard was correctly applied to the facts of this case.

Petitioners fail to establish that the district court or the court of appeals erred in its application of settled mootness principles. For example, petitioners fail to explain why a future visit by the Pope to the United States is anything more than a mere possibility on the present record. As the district court noted, the record contains no evidence of any plans for another visit here by the Pope (Pet. App. 30), and numerous future events could affect such a possibility (*ibid.*). For example, religious and political conditions in the United States and the rest of the world might very well lead the Pope and the Catholic Church to conclude that the Pope's time and attention is needed elsewhere, or that the goals of the Church would be advanced more significantly if he were not to return to the United States.

Furthermore, as the court of appeals observed (Pet. App. 35), there is no demonstrated probability on the present record that the Postal Service will commemorate any possible return by the Pope to the United States with special pictorial cancellations. Although the Postal Service

has issued such cancellation stamps in the past, the record contains no evidence that it has decided to do so in the future, and numerous circumstances might lead it to decide not to do so. For example, the Postal Service might decide that issuing such stamps would not be worth the time and effort, or might decide to refrain from issuing another stamp to commemorate a papal visit simply to avoid lawsuits such as the present one.[2]

Finally, petitioners have not demonstrated any probability that the present issue would evade review if it were to recur. If it should happen that another papal visit occurs and is accompanied by another commemorative stamp cancellation, then there is no reason why petitioners or others with like interests cannot (as petitioners did in this case) file a lawsuit sufficiently in advance of any

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[2] Similar contingencies have led this Court to conclude in several cases that there was no "demonstrated probability" that the same controversy would recur between the same parties. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 108 (holding plaintiff's claim for injunctive relief barring city police from using chokeholds in the future moot because the likelihood of the plaintiff's being subject to the chokehold again was based on mere speculation); *Murphy* v. *Hunt*, 455 U.S. at 482-483 (holding criminal defendant's suit challenging state court's denial of request for pretrial bail moot after defendant was convicted in state court because there was no "reasonable expectation" that he would ever be in the position of seeking pretrial bail again); *Weinstein* v. *Bradford*, 423 U.S. at 148 (holding plaintiff's challenge to procedures of his parole moot after he was released from supervision because there was no "demonstrated probability" that he would be subject to the state's parole system again). In each case, the challenging party's past involvement with the criminal justice system was insufficient to create a reasonable likelihood that he would be subject to the complained-of actions again, just as in this case, for the reasons stated above, the Postal Service's past decisions to issue cancellation stamps in connection with papal visits to the United States are insufficient to demonstrate that the present controversy will recur, and that it will evade review if it does.

future papal visit to allow a court to examine the issue before any commemorative stamps are actually issued. Petitioners' response to this point—an assertion that it is "improbable * * * that a lower court would grant an injunction against the Postal Service" (Pet. 9)—reflects either an unfounded cynicism about the judical system or, more likely, the grave substantive and procedural weaknesses in petitioners' case.[3]

2. Petitioners advance several arguments criticizing the lower courts' unanimous conclusions described above. Petitioners claim, for example, that the Pope probably will return to the United States because his last visit was a "great pastoral and financial success" (Pet. 7). Petitioners fail to cite any record evidence in support of that conclusion, however, and fail to prove that the Pope will evaluate the "success" of his last visit in those terms or evalute the merit of a future visit along the same lines.

Petitioners also claim that, *if* John Paul II were to make another pastoral visit to the United States, the Postal Service would gain economically from using special pictorial cancellation stamps again (Pet. 7-8). Once again, however, petitioners cite no record evidence to support their supposition. Moreover, it is far from certain that the Postal

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[3] Aside from the obvious improbability of petitioners' First Amendment theory in light of such cases as *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and *Bowen* v. *Kendrick*, No. 87-253 (June 29, 1988), it is extremely unlikely that petitioners have standing to challenge the Postal Service's issuance of commemorative stamps, at an appropriate price, to those who care to obtain them. Petitioners' tax dollars do not appear to have subsidized the issuance of the commemorative stamps in 1987 (see Pet. App. 19), so there is no "taxpayer standing" under *Flast* v. *Cohen*, 392 U.S. 83 (1968). Any other "injury" that petitioners might assert is nothing more than "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

Service's use of cancellation stamps will remain economically worthwhile and that the Postal Service will continue to consider the use of such cancellation stamps to be in the public interest. Furthermore, this argument addresses only one of the multiple contingencies that beset petitioners' case, ignoring the possibilities that the Pope will not return and that the controversy will not evade judicial review even if he does.

Petitioners finally claim that this case is one in which the Postal Service's "voluntary cessation" of the cancellation of stamps commemorating the 1987 visit should not be allowed to moot their challenge to the practice (Pet. 10). The "voluntary cessation" exception to the mootness doctrine does not apply to this case, however, because the action complained of is contingent on an outside event not within the Postal Service's control—the Pope's travel plans.[4]

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[4] Thus, *Hall* v. *Board of School Comm'rs*, 656 F.2d 999 (5th Cir. 1981), which petitioners cite (Pet. 10), is easily distinguishable. In that case, the school board merely promised on the eve of trial to cease its practice of allowing students to conduct devotional readings over the school's intercom system and allowing "Bible as literature" courses to be taught in a manner that advanced religion. The actions complained of were wholly within the school board's control and not contingent—as in this case—on outside events. The other court of appeals cases that petitioners cite are equally distinguishable. In both *Valley Construction Co.* v. *Marsh*, 714 F.2d 26 (5th Cir. 1983), and *Barrett* v. *Roberts*, 551 F.2d 662 (5th Cir. 1977), a continuing course of conduct between the parties was at issue, which made the dispute reasonably likely to recur. No such continuing course of conduct exists here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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